

BESTER (Migration) [2017] AATA 335 (23 February 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Lori Bester

CASE NUMBER: 1514363

DIBP REFERENCE(S): OSF2010/080848

MEMBER: John Cipolla

DATE: 23 February 2017

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:

- cl.100.221(2)(b) of Schedule 2 to the Regulations.
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- Statement made on 23 February 2017 at 11:51am

CATCHWORDS

Migration – Partner (Migrant)(Class BC) visa – Subclass 100 (Partner) – Nonresponsive to the Department – Lack of evidence – Additional information provided – Corroborative of a genuine and continuing spousal relationship

LEGISLATION

Migration Act 1958, ss 5F, 5F(2)(a)-(d), 65

Migration Regulations 1994, Schedule 3 – cl 100.221, 100.221(2) and 2A, 100.221(2)(b), r.1.15A(1)-(4)

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 30 September 2015 to refuse to grant the visa applicant a Partner (Migrant) (Class BC) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 31 March 2010 on the basis of her relationship with her sponsor. At that time, Class BC contained one subclass: Subclass 100 (Partner).
3. The criteria for the grant of a Subclass 100 visa are set out in Part 100 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy cl.100.221. Recourse to the decision record indicates that this is because at the time of the processing of the Subclass 100 visa the Department wrote to the applicant and the sponsor seeking evidence that the relationship between them was still genuine and continuing. As the couple failed to respond to this request the Department could not be satisfied that the relationship was still genuine and continuing and the visa was refused on that basis.
5. The applicant and the sponsor appeared before the Tribunal on 23 February 2017 to give evidence and present arguments.
6. The applicant was represented in relation to the review by a registered migration agent who attended the review hearing.
7. The Tribunal has received extensive evidence corroborative of a genuine and continuing spousal relationship at review stage. There have been a large number of statutory declarations from family and friends of the applicant and the sponsor from within Australia and from South Africa attesting to the length of the relationship, along with the fact that it is genuine and the evidence clearly adduces the fact that the applicant and the sponsor are clearly recognised as members of a couple by their friends and their immediate family. The evidence further indicates that the applicant and the sponsor have developed a close relationship with each others parents and siblings. There has been a lot of photographic evidence showing the applicant and the sponsor in a range of social situations both in Australia and overseas and there is evidence of the couple's wedding in November 2014 held on the Sunshine Coast in Queensland. Evidence has been provided of the financial aspects of the relationship in the form of joint bank statements and a number of utility bills and insurance certificates have also been provided. This evidence traverses a long period of time and is strongly indicative of the ongoing nature of the spousal relationship.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant and the sponsor continue to be in a genuine and continuing relationship to the exclusion of all others and have a mutual commitment to a shared life together.

10.

11. Whether the parties are in a spouse or de facto relationship

12. Clause 100.221 requires that the applicant meet one of five alternative requirements. These include cl.100.221(2) and (2A) which require, amongst other things, that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner'. Unless the applicant was granted a Subclass 309 visa by Ministerial intervention, the 'sponsoring partner' is the person who was specified as the applicant's spouse or de facto partner or intended spouse or de facto partner in the related Subclass 309 application, being an Australian citizen, permanent resident or eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor, a 'sponsoring partner' within the meaning of that term.

13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

14. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant and the sponsor were married in Queensland on 1 November 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

15. As has been noted above the applicant and the sponsor provided substantial evidence at review indicative of the genuine and continuing nature of their spousal relationship. Evidence has been provided that the couple were married on 1 November 2014 and a marriage certificate issued by the Registrar General in Queensland has been provided to the Tribunal to confirm this.

16. The Tribunal conducted a review hearing on 23 February 2017. The applicant and the sponsor attended the hearing along with their representative. At the outset of the review hearing the Tribunal explained the review process. The Tribunal noted that the applicant had made an application for a Subclass 309 visa on 31 March 2010 and was granted that visa. The Tribunal noted that there were 2 stages in the processing of the visa application which included an assessment prior to the grant of permanent residence to ascertain that the relationship was still genuine and continuing at that point in time. The Tribunal made reference to the Departmental decision which is dated 30 September 2015. The Tribunal noted that the Department had made a number of attempts to contact the applicant and the sponsor in December 2014 through to September 2015 however the Department were not able to make contact with the applicant and the sponsor. As a consequence of the lack of evidence before the delegate the application for the visa was refused.

17. The Tribunal noted that it had taken into consideration information provided to the Department of Immigration along with the substantial evidence that had been provided to the Tribunal at review stage. The Tribunal noted that it would also take into consideration evidence provided at the review hearing and if the Tribunal was satisfied that the relationship between the applicant and the sponsor was genuine and continuing that the matter could be remitted back to the Department of Immigration with a direction to that effect.
18. The Tribunal initially took evidence from the applicant who gave her name and date of birth. She advised that she was born in Cape Town South Africa. She advised that she had not been married before. She advised that she met the sponsor when she was living and working in London in 2007. She advised that at the time she was working for a property management company. She advised that the sponsor was working as a Catering Manager for the Tate Modern Gallery in London. She advised that she and the sponsor were living in separate apartments in a terrace house in Shepherd's Bush in London and this is where they met. The Tribunal asked the applicant whether her husband had any previous long-term relationships or marriages and she advised that he had not been married before.
19. The applicant advised that her husband was born in Caringbah in New South Wales and that she and her husband had lived together overseas and that they lived together for an extended period at Port Macquarie in New South Wales and they had now been in Brisbane for the past 4 years because of greater work opportunities available in Brisbane. The applicant advised that she had one sister who resided in Cape Town as did her parents. She advised that her husband had one sister who resided in Wauchope in New South Wales and that she was married with 3 children. She advised that her parents-in-law also lived in Port Macquarie.
20. The Tribunal asked the applicant about her current occupation and she advised that she worked for KPMG as a recruitment consultant. She advised that her husband was Assistant General Manager at Jamie's Italian in the CBD of Brisbane. The applicant advised that her husband had worked in hospitality for an extended period of time and had grown up in pubs.
21. The Tribunal asked the applicant about her and her husband's future plans. She advised that she and her husband would like to have children together and that they would also like to purchase real estate in Brisbane and that she had been looking around in a number of suburbs for a house to buy.
22. The applicant advised that she and her husband travelled a lot and enjoyed travelling together. She advised that she and her husband were engaged in 2012 and married in 2014. She advised that they had been back to visit her family in South Africa on a number of occasions and they had also travelled extensively in Europe and the United States. She advised that she and her husband had a wide circle of friends both in Australia and overseas and had good friends in Queensland which assisted them in the decision to relocate to Brisbane 4 years ago.
23. The Tribunal asked the applicant about the social aspects of her relationship and she advised that she and her husband enjoyed eating out together, cycling, going out for coffee and they also enjoyed the beach travelling down south to Currumbin and north to the Sunshine Coast.
24. The Tribunal asked the applicant about the financial aspects of her relationship and she advised that she and her husband had their own bank accounts in which the salaries were paid but they also had a number of joint accounts used for a range of things

including saving for a house deposit. The applicant stated that her husband paid all the bills and that he was very good with money.

25. The Tribunal took evidence from the sponsor. He gave his name and date of birth. He advised that he was born in Caringbah in Sydney. He advised that he met the applicant whilst on a working holiday in London. The Tribunal enquired how the meeting came about and the sponsor advised that he met his wife in Shepherd's Bush where they were residing in a terrace but in separate premises. He advised that this meeting took place in 2007. The sponsor advised that he and his wife had travelled extensively throughout Europe, had made a number of trips to South Africa to visit his wife's family, had travelled in Eastern Europe and the United States.
26. The Tribunal asked the sponsor about his residential history with the applicant in Australia. He advised that they lived in Port Macquarie for an extended period and that his parents resided in Port Macquarie and his sister resided in Wauchope. The sponsor advised that he and the applicant relocated to Brisbane because of greater work opportunities and that they were planning to buy a house in Brisbane and was saving hard toward this. The sponsor stated that his wife is currently looking for a house to buy and was pursuing her search in a number of suburbs around Brisbane. The sponsor advised that he worked as an Assistant Manager for restaurant, Jamie's Italian in Brisbane and that his wife worked for KPMG as a Recruitment Consultant in Executive Search and Selection. He advised that he and his wife were currently living in Greenslopes in rental accommodation.
27. The Tribunal asked the sponsor about the social aspects of the relationship and he advised that he and his wife enjoyed eating out together, spending time with friends, visiting with family, going to the beach and spending time in each other's company.
28. The Tribunal asked the sponsor about the financial aspects of the relationship and he advised that he and his wife maintained separate bank accounts in which their salaries were paid. However they had a number of joint bank accounts for example one that was used to save for a housing deposit.
29. The sponsor advised that he had a close relationship with his parents-in-law and sister in law and that his wife had a close relationship with his parents and sister as well as his sisters children.
30. **CONCLUSIONS**
31. The Tribunal has had the benefit of receiving oral evidence in person from the parties. It has also received a considerable amount of additional information that was not before the delegate which has been referred to above.
32. Given the above findings, the Tribunal is satisfied that at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is genuine and continuing. Accordingly the Tribunal finds that the applicant satisfies the definition of 'spouse' in s.5F(2)(a)-(d), and that the parties are in a spousal relationship.
33. The Tribunal is satisfied that at the time of this decision the parties are in a spousal relationship. Therefore the applicant meets cl.100.221(2)(b).
34. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 100 visa.

DECISION

35. The Tribunal remits the application for a Partner (Migrant) (Class BC) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 100 (Partner) visa:
36. cl.100.221(2)(b) of Schedule 2 to the Regulations.

John Cipolla
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).